IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

WEDNESDAY, THE 24TH JANUARY 2007 / 4TH MAGHA 1928

WP(C).No. 2830 of 2007(J)

EA 204/06 IN EP 33/06 IN OS 168/93 OF MUNSIFF COURT, TIRUR

PETITIONER:

CHEKKUMARAKARAKATH MUSTHAFA,
S/O.HAMEED HAJI, TIRUR TALUK, VETTAM AMSOM,
PADIYAM DESOM.

BY ADV. SRI.B.S.SWATHY KUMAR

RESPONDENTS:

PUTHIYAKATH NALAKATH KUNHIMOOSA,
S/O.SAIDU PUTHIYA NALAKATH, TIRUR TALUK,
VETTAM AMSOM, PADIYAM DESOM.

BY //

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 24/01/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

W.P.(C) .NO. 2830 OF 2007

Dated 24th January 2007

J U D G M E N T

Petitioner is 8th judgment debtor in O.S.168/93 on the file of Munsiff court, Tirur and respondent is the decree holder. As per final decree first respondent filed E.P.33/06 for getting the property allotted to him. Petitioner filed E.A.204/06 before executing court for an order of stay, contending that he had filed an appeal before Sub court, Tirur, but because of the delay in filing the appeal he could not get an order of stay and therefore to enable petitioner to get an order of stay from the appellate court, execution is to be stayed. Under Ext.P1 order, learned Munsiff granted an order of stay for two months. This petition is filed under Article 227 of Constitution of India, when under Ext.P3 further extension of stay was not granted by executing court.

2. Argument of learned counsel appearing for petitioner is that though an appeal was filed with an

application under Section 5 of Limitation Act, to condone delay, as notice on respondents 4,6 and 7 could not be served, delay petition was not heard and paper publication was ordered and he had already effected paper publication and appeal stands posted to 20/2/2007 and therefore petitioner is not in a position to get an order of stay before condoning delay and in meanwhile, if property is to be delivered in the execution petition, the very purpose of the appeal will be defeated and in such circumstance, execution of the decree may be stayed.

3. Question whether appeal is to be admitted or not, is to be decided by the Sub court and that too after considering the question whether there is sufficient cause to condone the delay in filing the appeal. As per order dated 19/8/2006, executing court granted two months time to petitioner to get an order of stay from appellate court. Even though paper publication has been effected, according to petitioner, he did not get the order from appellate court as the application for condoning the delay was not heard. Petitioner is not entitled to get order of stay in the guise of pendency of an application under Section 5 of Limitation Act. If petitioner is so advised, petitioner

can file an application for advancing the hearing of the application under Section 5 of Limitation Act, pending before Sub court, Tirur and get an order in the application and thereafter seek an order of stay of execution. To enable the petitioner to approach the appellate court executing court is directed to stay order for delivery for two weeks from today. If petitioner files an application to advance the hearing of A.S.69/05, Sub Judge, Tirur to advance the hearing and pass appropriate order in the application to condone the delay and if that is condoned in the application for stay also as expeditiously as possible and at any rate, within two weeks from today.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.